

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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THOMAS LOPER,

Plaintiff-Appellant,

v

JOHN DOE,

Defendant,

and

PL & L INVESTMENTS II, L.L.C., TOWN  
LIMOUSINE, d/b/a GM LIMO and MOTOWN  
LIMO, and CONCEPT MOLD,

Defendants-Appellees.

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UNPUBLISHED

May 19, 2005

No. 252675

Macomb Circuit Court

LC No. 03-000960-NO

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendants PL & L Investments II, L.L.C. ("PL & L"), Town Limousine ("Town Limo") and Concept Mold. We affirm.

I. Facts and Procedure

On December 31, 2002, plaintiff hired Town Limo to transport him and friends and family members of his to parties and other events celebrating New Year's Eve. After midnight, the limousine driver took plaintiff and the other revelers to Town Limo's offices to get champagne promised to plaintiff in the contract. PL & L owned the warehouse in the industrial park that housed both Town Limo's offices and Concept Mold's factory. The limousine driver pulled into the parking lot outside the warehouse that contained the offices for Town Limo and stopped the limousine near the entry doors to Concept Mold, where a party was in progress. The party was sponsored by Scott Fleury, the son of Concept Mold's owner. Fillipo Leone, PL & L's owner and the landlord for the warehouse leased to Town Limo and Concept Mold, was unaware of the party. The limousine driver walked into the warehouse, and plaintiff and several other party members got out of the limousine. Shortly thereafter, several unidentified men associated with the Concept Mold party exchanged heated words with plaintiff and his party members.

While in the parking lot, an unidentified assailant approached plaintiff from behind and kicked him in the leg, knocking plaintiff to the ground and injuring his leg and knee. When the limousine driver returned, he took plaintiff to the hospital. Plaintiff later underwent surgery for injuries sustained from the assault.

Plaintiff filed suit, asserting a claim of assault and battery against his unidentified assailant, identified only as “John Doe,” and negligence against PL & L, Town Limo, and Concept Mold. The trial court granted summary disposition for defendants.

## II. Analysis

### A. Standard of Review

We review de novo a trial court’s decision to grant or deny a motion for summary disposition. *Adair v Michigan*, 470 Mich 105, 119; 680 N 386 (2004). The existence of a legal duty is a question of law that this Court also reviews de novo. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dep’t of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* at 163. When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

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A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). [*Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999)].

### B. Discussion

Plaintiff contends that defendants were negligent in contributing to the creation of a dangerous situation that exposed him to harm. Plaintiff asserts that Concept Mold’s liability arises from its illegal provision of alcohol to minors, which caused plaintiff to be assaulted. Plaintiff argues that PL & L is liable as the owner of the property where plaintiff was assaulted and through their relationship with Concept Mold. Plaintiff argues that Town Limo is liable because it breached its duty to plaintiff as a common carrier by taking plaintiff and his companions to a location where the potential for harm to plaintiff was foreseeable.

“In order to establish a prima facie case of negligence, the plaintiff must prove: ‘(1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the defendant’s breach of duty was a proximate cause of the plaintiff’s damages; and (4) that the plaintiff suffered damages.’ ” *Terry v Detroit*, 226 Mich App 418, 424; 573 NW2d 348 (1997), quoting *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 203; 544 NW2d 727 (1996). “The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff.” *Fultz, supra* at 463. “Duty is an obligation that the defendant has to the plaintiff to avoid negligent conduct.” *Terry, supra* at 424. “[A] negligence action may be maintained only if a legal duty exists that requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm.” *Graves v Warner Bros*, 253 Mich App 486, 492; 656 NW2d 195 (2002). Courts evaluate different variables to determine whether a duty exists, including

“foreseeability of the harm, existence of a relationship between the parties involved, degree of certainty of injury, closeness of connection between the conduct and the injury, moral blame attached to the conduct, policy of preventing future harm, and the burdens and consequences of imposing a duty and the resulting liability for breach.” *Id.* at 492-493, quoting *Krass v Tri-County Security, Inc*, 233 Mich App 661, 668-669; 593 NW2d 578 (1999).

“If a court determines as a matter of law that a defendant owed no duty to a plaintiff, summary disposition is appropriate under MCR 2.116(C)(8).” *Terry, supra* at 424.

Generally, there is no legal duty obligating one person to aid or protect another. *Graves, supra* at 493. “Moreover, an individual has no duty to protect another from the criminal acts of a third party in the absence of a special relationship between the defendant and the plaintiff or the defendant and the third party.” *Id.* The basis for this rule is the recognition that “ ‘[c]riminal activity, by its deviant nature, is normally unforeseeable.’ ” *Id.*, quoting *Papadeimas v Mykonos Lounge*, 176 Mich App 40, 46-47; 439 NW2d 280 (1989). “ ‘ “[U]nder all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law.” ’ ” *Graves, supra* at 493, 499, quoting *Papadeimas, supra* at 47, quoting Prosser & Keaton, Torts (5<sup>th</sup> ed), § 33, p 201.

### 1. PL & L’s Liability

Plaintiff argues that the trial court erred in concluding that PL & L was not liable for his injury. PL & L was the owner of the property where the assault occurred, and was leasing the property to Town Limo and Concept Mold. “[T]he same duty that a landlord owes to its tenants also is owed to their guests, because both are the landlord’s invitees.” *Stanley v Town Square Cooperative*, 203 Mich App 143, 148; 512 NW2d 51 (1993). Owners and occupiers of land have a special relationship to their invitees, giving rise to a duty to reasonably respond to situations that occur on the premises that pose a risk of imminent and foreseeable harm to identifiable invitees. *Graves, supra* at 494, 496-497, citing *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001). “[T]he duty that a possessor of land owes his invitees is not absolute. He is not an insurer of the safety of an invitee. His duty is only to exercise reasonable care for their protection.” *Stanley, supra* at 150. “The duty exists only when the landlord created a dangerous condition that enhances the likelihood of exposure to criminal assaults.” *Id.* While this duty includes taking reasonable measures in response to an ongoing situation that is taking place on

the premises, it does not include an obligation to otherwise anticipate the criminal acts of third parties. *MacDonald, supra* at 338.

Here, PL & L was unaware of Concept Mold's hosting of a social event on the premises. Further, this party did not pose a risk of imminent and foreseeable harm to plaintiff. PL & L did not have a duty to anticipate the assault on plaintiff by a third party. Further, the danger or potential of plaintiff's falling victim to a criminal assault in the parking lot was not the result of a dangerous condition that was created by the landlord. As such, the trial court correctly granted summary disposition in favor of PL & L.

## 2. Concept Mold's Liability

Plaintiff also contends that the trial court erred in granting summary disposition in favor of Concept Mold. Plaintiff contends that Concept Mold proximately caused his injuries by creating a dangerous situation on the property where the assault took place by violating the statutory proscription against the unauthorized sale and provision of alcohol to minors, MCL 436.1701. This Court has ruled that "[s]erving alcohol to an underage person . . . creates a rebuttable presumption of negligence; however, a plaintiff must still demonstrate that the furnishing of alcohol proximately caused the plaintiff's injury." *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002). "Proximate cause 'normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences.' " *Id.*, quoting *Haliw v Sterling Heights*, 464 Mich 297, 310; 627 NW2d 581 (2001), quoting *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). In *Nichols, supra* at 537, this Court held that where the plaintiff was "an innocent victim of an unprovoked attack that occurred on the premises where the alcohol was served and that was an outgrowth of a dispute that developed at the party," the "issue of proximate causation" was "properly left to the jury."

Plaintiff alleges that Concept Mold proximately caused his injuries by providing alcoholic beverages to minors at the party where he was assaulted. However, Contest Mold submitted evidence that, although minors were present at the party, the alcohol was monitored and dispensed only to individuals wearing wristbands verifying that they were of a legal age to consume alcohol. Plaintiff failed to rebut this evidence by providing evidence that minors were furnished with alcohol at the party. Plaintiff further failed to demonstrate that the individual who assaulted him was either a minor or had consumed alcohol. "[A] party opposing a motion brought under MCR 2.116(C)(10) may not rest upon the mere allegations or denials in that party's pleadings, but must by affidavit, deposition, admission, or other documentary evidence set forth specific facts showing there is a genuine issue for trial." *Marlo Beauty Supply, Inc v Farmers Ins Group of Companies*, 227 Mich App 309, 321-322; 575 NW2d 324 (1998), mod on other grounds *Harts v Farmers Ins Exchange*, 461 Mich 1; 597 NW2d 47 (1999). "Allegations unsupported by some basis in fact may be viewed as sheer speculation and conjecture and, therefore, ripe for summary disposition." *Easley v University of Michigan*, 178 Mich App 723, 726; 444 NW2d 820 (1989). Thus, plaintiff failed to create a rebuttable presumption of negligence.

Further, the party did not pose a risk of imminent and foreseeable harm to plaintiff, as Concept Mold could not anticipate a third party's assault on plaintiff. The danger or potential of plaintiff's falling victim to a criminal assault in the parking lot was not the result of a dangerous

condition that was created by Concept Mold. As such, the trial court correctly granted summary disposition in Concept Mold's favor.

### 3. Town Limo's Liability

Plaintiff next argues that the trial court erred in granting summary disposition in favor of Town Limo. Plaintiff contends that Town Limo, because of its status as a common carrier, had a special relationship to him and thus had a duty to protect him from the criminal acts of a third party. Town Limo disputes plaintiff's characterization of its status as a common carrier and plaintiff's status as a passenger. However, even assuming the status of Town Limo as a common carrier<sup>1</sup> and plaintiff as a passenger,<sup>2</sup> we conclude that the trial court properly granted summary disposition for Town Limo. A common carrier has the duty "to exercise such diligence as would be exercised in the circumstances by a reasonably prudent carrier." *Frederick v Detroit*, 370 Mich 425, 437; 121 NW2d 918 (1963). A common carrier has a special relationship with its passengers that imposes an obligation to take reasonable action to protect those passengers against an unreasonable risk of harm. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 397 n 2, overruled in part on other grounds *MacDonald, supra* at 334 n 10; *Graves, supra* at 494. A common carrier also has a duty to its passengers to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others. *Mason, supra* at 397 n 2.

Here, plaintiff has failed to demonstrate that Town Limo breached this alleged duty. The limousine driver for Town Limo pulled into the parking lot of the Town Limo offices to retrieve champagne to fulfill the contract with plaintiff. While the driver was in the office, plaintiff got out of the limousine and was physically assaulted by the unidentified individual, who was apparently from the Concept Mold party. Although the driver for Town Limo took plaintiff to its offices and left plaintiff unsupervised in the limousine, he did not leave plaintiff for an

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<sup>1</sup> " " "A common carrier is one who, by virtue of his calling, undertakes, for compensation, to transport personal property from one place to another for all such as may choose to employ him, and every one who undertakes to carry compensation the goods of all persons indifferently, is as to liability, to be deemed a common carrier." ' " *G & A Truck Line, Inc v Pub Service Comm*, 337 Mich 300, 307; 60 NW2d 285 (1953), quoting *Michigan Pub Utilities Comm v Krol*, 245 Mich 297, 302-303; 222 NW 718 (1929), quoting *Jackson Architectural Iron Works v Hurlbut*, 158 NY 34; 52 NE 665 (1899). "[A] common carrier must accept and transport personal property for all who choose to employ it." *G & A Truck Line, supra* at 307. A private carrier, in contrast, is not obligated to serve all who apply for passage. *Krol, supra* at 303. Town Limo's status as a common carrier is in question because it is a private transportation company that contracts with individual customers for service.

<sup>2</sup> "A person's status as a passenger of a street car or automobile continues 'until he has safely stepped therefrom and had a reasonable opportunity to leave the place at which he alights.' " *Burch v A & G Assoc, Inc*, 122 Mich App 798, 806; 333 NW2d 140 (1982), quoting 13 CJS, Carriers, § 565, p 1073. Plaintiff's status as a passenger is in question because he was not injured by the manner in which the limousine was driven or in the process of alighting from the limousine, but was injured outside the limousine after it had stopped.

unreasonable length of time in a situation that posed a foreseeable or unreasonable risk of harm. The driver had no reason to think that leaving plaintiff in the limousine with a party going on nearby would pose a risk of harm to plaintiff. Plaintiff had stepped out of the limousine and been assaulted between the time the driver went into the office and returned to the limousine. Thus, the driver could have done nothing to prevent the assault. When the driver found plaintiff injured upon his return to the limousine, he took plaintiff to the hospital for treatment. Thus, he fulfilled his duty of caring for plaintiff after he knew that plaintiff was injured. The trial court did not err in granting Town Limo's motion for summary disposition.

Affirmed.

/s/ Henry William Saad

/s/ Brian K. Zahra

/s/ Bill Schuette